Case No. 92-1549

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

CONNIE C. RESHARD and LEROY RESHARD, etc.,

PETITIONERS;

v.

DR. EARL BRITT; DR. GEORGE BONK; DR. PANKAJ CHOKHAWALA; DR. DAVID MOORE; TALLAHASSEE MEDICAL CENTER, INC., d/b/a TALLAHASSEE COMMUNITY HOSPITAL,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

The Respondents, Dr. Earl Britt; Dr. George Bonk; Dr. David Moore; Dr. Pankaj Chokhawala; and Tallahassee Medical Center, Inc., d/b/a Tallahassee Community Hospital [hereinafter Tallahassee Community Hospital];[1] respectfully request this Honorable Court to deny the petition for the issuance of a writ of certiorari.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, in this case, is as follows:

PER CURIAM:

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[1] The identities of all the Parties are included in the style of the case. The parent company of Respondent Tallahassee Medical Center, Inc., is Hospital Corporation of America. Tallahassee Medical Center, Inc., has no subsidiaries that are not wholly owned. Sup.Ct.R. 29.1.

> The issues Appellant raises in this appeal are meritless. The district court committed no error, much less an abuse of its discretion, in (1) refusing to disqualify defense counsel; (2) refusing to grant the plaintiffs a default against the defendants; and (3) in dismissing plaintiffs' wrongful death action with prejudice. Every finding of fact complained of is well supported by the record, and the court properly applied the law to each such finding.
>
> AFFIRMED.[2]

Appendix to Petition for Certiorari at 4 [hereinafter cited as "Pet. App." followed by the appropriate page number].

STATEMENT OF THE CASE AND FACTS

1. Respondents' Statement: Adoption of Trial Court Order and Appellate Decision

The key Record item is the sixty-three page Order, Report and Recommendation of the United States Magistrate (R10-376), reproduced in the Petitioners' Appendix to Petition for Certiorari, at page 18 (marred, unfortunately, by Petitioners' "editorial" comments). That Report and Recommendation reflects extensive factual findings expressly "based upon documents filed in this case, answers to interrogatories,

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[2] Petitioners include "editorial" comments throughout their Appendix, some of which suggest that the Court of Appeals may have vacated its decision below, which was rendered on September 30, 1992. Appendix to Petition for Certiorari at 3-4. Petitioners' only basis for this suggestion is that the Mandate, which was issued on February 26, 1993, did not include the full text of the Court's previously issued *Per Curiam* pronouncement. It is clear, however, that the circuit court did not vacate its September 30th decision.

transcripts of depositions, orders entered by this court, affidavits, and statements made to this court by counsel for the parties in hearings before this court" (R10-376-16; Pet. App. at 37), and it is replete with citations to the balance of the Record. That Report and Recommendation was reviewed by, and adopted as the Order of, the District Court (R10-396; Pet. App. at 8), which thereupon entered the Order of Dismissal from which appeal was taken to the United States Court of Appeals for the Eleventh Circuit, where the District Court Order was reviewed and affirmed. Pet. App. at 1-4.

Accordingly, Respondents adopt that initial, twice-reviewed Report and Recommendation as their statement of the relevant facts; and Respondents incorporate it herein, by reference. Nevertheless, Respondents will recite here, in conclusory fashion, some of the more salient facts found below:

(1) The Petitioners, dating back to 1986, have "an extensive history of dilatory behavior" herein, which "continued unabated by the willful timing of baseless motions." R10-376-57; Pet. App. at 114.

(2) By the Petitioners' "numerous spurious motions to block discovery, unilateral cancellation of scheduled depositions, frivolous but lengthy appeals of every order entered by the magistrate, and finally, willful disobedience to this court's order;" Petitioners carried out a campaign, beginning in 1986, to hamper Respondents' efforts to discover the opinions of any

experts that might be presented by the Plaintiffs at trial. R10-376-57; Pet. App. at 113.

(3) Petitioners engaged in "unreasonable unilateral obstruction of discovery," by interposing objections that were "baseless." R10-376-19, 20; Pet. App. at 45-46.

(4) Petitioners made false statements of fact, in sworn answers to interrogatories, with respect to the nature and content of the expert-opinion testimony that they would present at trial. R10-376-53, 58; Pet. App. at 105, 114-16.

(5) Petitioner Connie Reshard testified falsely, on deposition, with respect to a number of substantive matters pertaining to Petitioners' expert witnesses. R10-376-53; Pet. App. at 105.

(6) Petitioner/Petitioners' Counsel knowingly made false statements to the Court, in the course of a hearing, upon which the Court and opposing counsel relied. R10-376-39, 53; Pet. App. at 82, 106.

(7) Petitioners willfully disobeyed a court order to make their two alleged expert witnesses available for deposition. R10-376-53, 54; Pet. App. at 106-107.

(8) Petitioners willfully attempted to obstruct the Trial Court by instructing a subpoenaed witness not to attend a court-ordered deposition. R10-376-53; Pet. App. at 106. *See also* R10-376-54 n.16 (pertaining to the uncontested statement of another expert witness, indicating that Petitioners also told him not to attend his court-ordered deposition, which the Trial Court indicated "would be another incident of willful obstruction of this court's order to Plaintiff's attorney.")

(9) The Petitioners filed a midnight Motion to Quash depositions not only "in bad faith as an intentional effort . . . to obstruct discovery," but also in an intentional effort "to cause needless expense to [the Respondents]." R10-376-36; Pet. App. at 113.

(10) The Petitioners have made false and demonstrably baseless statements of medical "fact," in an effort to bolster claims that Respondents had destroyed evidence. R10-376-10; Pet. App. at 26.[3]

(11) Petitioners have engaged in a "vindictive abuse of the adjudicative process," using it to engage in the "malicious accusation" of opposing counsel. R10-376-11, 12; Pet. App. at 28-29.

(12) Petitioners have engaged in the "willful distortion of the plain words of this court's orders . . . throughout the unfortunate history of this case." R10-376-17, n.4; Pet. App. at 40.

These and other findings and conclusions, and the Record upon which they are based, were subjected to a *de novo* review in the District Court (Chief Judge William H. Stafford, Jr., presiding), which Court thereafter adopted them as its own. Petitioners appealed to the Court of Appeals, where the Record was again

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[3] Wholly immaterial to the pending Petition, but interspersed throughout it, are numerous statements pertaining to the human anatomy, or to other medical matters, that are either false or misleading. For example, Petitioners improperly use the terms "dissecuon," "aneurysm," and "rupture" interchangeably, in order to suggest that others, including a non-party pathologist, have made inconsistent statements and are therefore guilty of fraud. Petition at 13, 14. Likewise, they falsely suggest that the human thyroid is located in the chest. *Id.* at 19.

reviewed, in light of the actions taken by the Trial Court and also in light of Petitioners' attacks on opposing parties, opposing counsel, and court personnel, attacks which characterize the Petition here.

Concluding this appeal, the Court of Appeals for the Eleventh Circuit, in an unpublished *per curiam* decision, *Reshard v. Britt*, 976 F.2d 742, *reh'g en banc denied*, 981 F.2d 1264 (11th Cir. 1992), held that the Trial Court findings were fully sustained by the Record, that those findings provided a sufficient basis for the action taken, and that Petitioners' appellate assertions were "meritless." Pet. App. at 4.

2. Petitioners' Statement: Continued Distortion and Personal Attack

For the most part, Petitioners omit the material facts, and include immaterial allegations, in their Petition. Respondents resist the temptation to "pick apart," in this response, those baseless and immaterial charges, many of which relate to the "merits" of the Petitioners' underlying tort claim: Although they are largely and fundamentally false, they are also irrelevant.

With respect to what *is* material, Petitioners seek to avoid the Record, as can be gleaned from the Petition itself. They have mischaracterized the findings below;[4]

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[4] Petitioners assert that sanctions were imposed "because Plaintiffs failed to attend [court-ordered] depositions," Petition at 31, and that this "failure to appear for the depositions were [sic] justified." *Id.* at 32. However, as is clear from Petitioners' Appendix, the sanctions were imposed for a host of improprieties, including lying to the court and opposing counsel, Pet. App. at 77-84, 106; enticing opposing counsel to travel to court-ordered depositions, knowing that

and they have trivialized the Trial Court's findings by inserting "editorial comments" (such as, "not so" and "not true") throughout the orders contained in Petitioners' Appendix. *See, e.g.*, Pet. App. at 39-41.

Indeed, Petitioners seek even to discredit their own testimony and argument below. For example, they argue that "[t]he factual findings . . . with regard to Connie Reshard's testimony was [sic] clearly in error," Petition at 57,. but that "Connie Reshard has not reviewed her deposition since it was not signed [by her] in compliance with Rule 32(b) and (e), Fed.R.Civ.P. Pet. App. at 131." *Id.* at n.17.

Ultimately, when Petitioners wish to avoid what they presented and argued at hearings before the Trial Court, they simply call the Record a lie and the Court Reporter a liar. The Petitioners mount this accusation, before this Honorable Court, in "blanket" fashion, covering all contingencies:

> The alleged finding that Connie Reshard waived her rights is erroneous in fact and law. *Any* statements *said* to be in support of that contention which are contained in the transcript of the June 29, 1990 proceeding before Magistrate Sherrill demonstrate the material alteration of a transcript by [Court Reporter] Paul Rayborn.

Petition at 56. (footnote omitted)(emphasis added).

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they would be unilaterally "cancelled" by Petitioners, Pet. App. at 85-91; and advising deponents that they need not comply with the court's subpoena. Pet. App. at 98-106.

However, there is no record basis for this charge, nor was the "issue" ever presented to the Trial Court.[5]

SUMMARY OF ARGUMENT

There are no special or important reasons for granting a Writ of Certiorari in this case.

Contrary to Petitioners' assertions, there is no conflict among the various circuit courts of appeals with respect to the application of the abuse-of-discretion standard in reviewing the dismissal of an action, as a sanction, pursuant to Federal Rules of Civil Procedure 37, 41 and 16. Moreover, this Court has previously and clearly outlined the factors that should be considered when conducting such an appellate inquiry, and the law of the Eleventh Circuit--as articulated elsewhere and as

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[5] In other litigation, Petitioners' counsel has made substantially similar accusations. Thus, in her Petition for Writ of Certiorari filed in this Court in *Reshard v. Comm. on Admissions for Dist. of Columbia Court of Appeals* (Case No. 92-1292), *cert. denied*, 61 U.S.L.W. 35 (U.S. Mar. 23, 1993), Petitioner/Petitioners' counsel acknowledged that the Committee on Admissions to the Bar had expressed concerns

> "about allegations of bias and/or dishonesty made [by Connie Cornelia Reshard] against [United States District Court] Judge John Garrett Penn, and court reporters Harry Deustch and S. Popejoy, and what appeared to be allegations by [her] of bad faith on the part of Judge W. Bryant all made during the course of *Reshard v. Burnley*, U.S.D.C. D.C. Civ. No. 87-2794 JGP . . . ."

Id., Petition for Certiorari at 6, n.2. *See also*, The Recommendation of the Committee on Admissions, *id.*, Appendix, which reports that "in cases [Petitioners' counsel] litigated *pro se*, she has made allegations of bias and/or dishonesty against two Federal judges and three court reporters." *Id.* at 28.

applied in this case--is consistent with that determined by this Court and applied in the other Circuits. Finally, because reviewing the dismissal of an action, as a sanction, is inevitably a fact-intensive inquiry, each such case is arguably unique. In any event, the boldly egregious and stubbornly continuous misconduct of Petitioners herein, as shown by the Record, may well be unprecedented.

From the outset of this case, the Petitioners, initially in a *pro se* capacity and later through counsel (Petitioner Connie Reshard), have engaged in a pattern of increasingly outrageous misconduct--ultimately including the willful violation and deliberate obstruction of court orders. Nevertheless, the Trial Court exhibited appropriate restraint and yet also repeatedly urged Petitioners to permit discovery and warned that severe sanctions would be imposed if the misconduct continued. But, rather than cooperating in discovery, Petitioners concocted and carried out a strategy that involved misrepresentation of their evidence and the frustration of Respondents' efforts to discover the truth. The tactics utilized by Petitioners included the unilateral "cancellation" of depositions; the filing of numerous, baseless objections, motions, and appeals; diversionary, baseless attacks on opposing counsel and parties; and, ultimately, lying to the court and to opposing counsel. As found below, some of these actions were taken in a vindictive spirit aimed at causing maximum damage and waste to Petitioners' opponents.

Ultimately, Petitioners were caught having lied to opposing counsel and to the Court itself, and caught having advised subpoenaed witnesses not to appear. This having been disclosed, and following ample notice to Petitioners, the Magistrate conducted a full and fair evidentiary hearing on motions for sanctions, at which Petitioner Connie Reshard appeared, as counsel on behalf of the Petitioners. Based upon that hearing and a comprehensive review of the Record, the Magistrate entered a lengthy, sixty-three page Order, Report and Recommendation, recommending dismissal. In the Report, the Magistrate carefully and expressly considered whether a lesser sanction would be adequate to serve the purposes of the various Rules implicated by the misconduct; and concluded that, on these facts, dismissal was appropriate and, indeed, required. Petitioners were granted extensive time in which to file objections to the Report and Recommendation. Objections were filed, the presiding District Judge conducted a *de novo* review, and the Trial Court ultimately concluded that dismissal was the appropriate sanction under the circumstances.

On direct appeal, a panel of the Court of Appeals for the Eleventh Circuit reviewed the Record, and concluded that the Trial Court committed "no error, much less an abuse of discretion," and that Petitioners' contentions were "meritless."

The decision below is entirely consistent with the decisions Petitioners cite in the Petition for Certiorari, the case was correctly decided, and the Petition for Certiorari should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not "directly conflict" with that of the Court of Appeals for the Eighth Circuit in *Equal Employment Opportunity Commission v. Carter Carburetor*, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979).

In *Carter Carburetor*, the trial court ordered sanctions against the EEOC, pursuant to Rule 37(b), for allegedly refusing to fully answer certain interrogatories. On appeal, however, the court of appeals held that the trial court had abused its discretion, because the "record [was] clear" that "the dilatory tactics of Carter Carburetor . . . [were] at least the equal of the tactics of the EEOC," and because of the "highly irregular" procedures leading to the sanctions order. *Id.* at 49. In *Carter Carburetor*, the motion for sanctions was filed without a prior motion to compel answers to the interrogatories, and the sanctions order was entered following "an *ex parte* letter from Carter Carburetor and without [the district court] ever hearing from the EEOC." *Id.* Moreover, the EEOC had in fact attempted to answer Carter Carburetor's interrogatories, and it was Carter Carburetor's failure to permit discovery that effectively precluded the EEOC from providing complete answers. *Id.* at 47 n.2.

The Eleventh Circuit's decision herein is entirely consistent with that of the Eighth Circuit in *Carter Carburetor*. First, Petitioners' allegations that Respondents concealed or destroyed evidence, and

engaged in discovery abuses, are just that: mere allegations; and they are entirely without support in the Record. Moreover, Petitioners' misconduct far exceeds the minor discovery violations found in *Carter Carburetor*. Here, the Record amply supports the Trial Court's findings that Petitioners willfully violated and deliberately obstructed orders of the court, knowingly made false representations to the court, and, essentially, perjured themselves in interrogatories and on deposition.

Second, in contrast to the "irregular procedures" employed by the trial court in *Carter Carburetor*, the District Court in the instant case afforded Petitioners a full and fair evidentiary hearing, following ample notice of allegations set forth in extensively documented motions for sanctions, to which written responses had been received from Petitioners. Petitioner Connie Reshard (as Counsel for Petitioners) represented Petitioners at the hearing, and every item of evidence and information which Petitioners sought to share with the Court was duly received and considered. Thereafter, the Magistrate entered a sixty-three page Order, Report and Recommendation, thoroughly explaining (with citation to pleadings and testimony in the Record) the basis for recommending dismissal. United States District Judge Stafford, with the full benefit of Petitioners' objections, conducted a *de novo* review of the Record, prior to entering the Final Judgment of Dismissal. There is no suggestion, in the Record, that the procedures below were in any sense "irregular."

Thus, the Eleventh Circuit's decision herein does not conflict with that of the Eighth Circuit in *Equal Employment Opportunity Commission v. Carter Carburetor*, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979).

2. The decision below does not conflict with those of the Court of Appeals for the Ninth Circuit.

Petitioners suggest that the decision below conflicts with certain decisions of the Court of Appeals for the Ninth Circuit, arguing that the Ninth Circuit requires, of the trial courts, both the imposition of prior sanctions and a clear warning of the possibility of dismissal, in order to sustain a dismissal sanction.

However, Petitioners misstate the law of the Ninth Circuit; there is no pertinent conflict between the Ninth and Eleventh Circuits; and, in any event, prior sanctions were imposed, and prior warnings were given, in the Trial Court.

a) The Ninth Circuit does not require, as a prerequisite to dismissal, the imposition of prior sanctions and the giving of prior warnings.

In determining whether a trial court has abused its discretion in dismissing a case as a sanction, the Courts of Appeals for both the Ninth Circuit and the Eleventh Circuit *consider*, as one factor of several, whether the trial court considered lesser sanctions. *See, e.g., Rubin v. Belo Broadcasting Corp. (In re Rubin)*, 769 F.2d 611, 617 (9th Cir. 1985); *Aztec Steel Co. v. Florida*

Steel Corp., 691 F.2d 480, 481-82 (11th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). *Both* Courts of Appeals prefer that the trial court explicitly discuss, on the record, the reasons why lesser sanctions are not adequate. *See, e.g., Malone v. United States Postal Service*, 833 F.2d 128, 132 (9th Cir. 1987), *cert. denied sub nom. Malone v. Frank*, 488 U.S. 819 (1988); *Mingo v. Sugar Cane Growers Co-Op.*, 864 F.2d 101, 102 (11th Cir. 1989). Likewise, in making their appellate determinations, *both* Courts *consider* whether prior sanctions were imposed and whether prior warnings were given. *See, e.g., Malone*, 833 F.2d at 132; *Jones v. Graham*, 709 F.2d 1457, 1462-63 (11th Cir. 1983).

But, contrary to Petitioners' assertion, the Ninth Circuit does not *require* that the trial court impose prior sanctions and explicitly warn that dismissal might later be imposed. For example, in *Malone*, a panel of the Ninth Circuit affirmed a dismissal sanction, notwithstanding the absence of an explicit warning. The court stated:

> A plaintiff can hardly be surprised by a harsh sanction in response to willful violation of a pretrial order. Rule 16(f) and 41(b) explicitly state that dismissal may be ordered for violation of a court order.

Malone, 833 F.2d at 133. In this case, the Petitioners willfully violated, and even obstructed, court orders.

b) The Trial Court explicitly discussed the adequacy of alternative sanctions, imposed prior sanctions, and gave prior warnings.

In the instant case, the Trial Court *did*, explicitly and thoroughly, consider the adequacy of lesser sanctions, including an award of expenses and fees; an order of contempt; an order striking pleadings, defenses or claims; and an order excluding expert testimony. However, having carefully considered lesser sanctions, the Trial Court concluded that lesser sanctions would be inadequate, and it explained the reasons why this conclusion was reached. Pet. App. at 115-118; R10-376-58.

Additionally, Petitioners were repeatedly warned that serious sanctions would be imposed if their misconduct continued, and prior sanctions were imposed. Early in the case, in August 1986, the Trial Court noted its concern that "Plaintiffs [Petitioners] may be slowing the progress of this litigation," and the Court thus sanctioned Petitioners by ordering that no further extensions of discovery would be permitted, absent extraordinary cause. R2-111; Pet. App. at 46. In that same order, the Trial Court found that the "Plaintiffs [Petitioners] had not made a good faith effort" to comply with a previously entered discovery order; and the Court thus warned Petitioners that "*Searock* [*v. Stripling*, 736 F.2d 650 (11th Cir. 1984)] authorizes the court to impose sanctions if a party fails to make a good faith effort to produce documents as ordered by the court." R2-111-6.

Following remand of the case, after the Petitioners' interlocutory appeal to the Court of Appeals for the Eleventh Circuit, the Trial Court entered an order, in June 1990, stating that

> Sanctions will not be awarded as a result of this round of discovery problems because some of the problems seem to have occurred some years in the past. Since this case is now in active discovery and will be closely monitored by the court, it is hoped that sanctions will not be needed to keep this case on track.

R5-220.

At the same time, however, the Trial Court sanctioned Petitioners, by granting Respondent Tallahassee Community Hospital's motion to strike a portion of a pleading filed by Petitioners, wherein Petitioners falsely charged opposing counsel with dishonestly misleading the Court regarding a discovery matter. R5-220-7.

The Trial Court also took measures designed to encourage Counsel for Petitioners to communicate, as required by local rule, with Counsel for the Respondents--who were trying to coordinate discovery. For example, in June 1990, the Trial Court found it necessary to enter an order requiring counsel for Petitioners to file, with the Court, a telephone number where she could be reached, and to return telephone calls. R5-224.

At a hearing held on June 29, 1990, the Magistrate denied the Petitioners' Motion to Quash the depositions of Petitioners' purported expert witnesses, and again warned that, if the on-going discovery difficulties continued, he would hold an evidentiary hearing and "recommend [to Judge Stafford], one way or the other, where the hammer will fall." R14-19. As the

Magistrate later stated, in his Report and Recommendation, "[t]he language used was as forceful as the court could make it." Pet. App. at 74.

In July 1990, Judge Stafford affirmed certain discovery orders, and remanded the case to the Magistrate for consideration of a Respondent's motion for an award of attorneys fees and costs, as a sanction, against the Petitioners. R5-251. Shortly thereafter, in August 1990, the Trial Court found Petitioners' appeal of yet another discovery order to also be "frivolous," and admonished Petitioners that "[t]he court regards such dilatory tactics with disfavor." The Trial Court "cautioned [Petitioners] that this court's patience is not inexhaustible" and cited *Griffen v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984), in which the Court of Appeals affirmed a default judgment entered as a sanction for a defendants' delay and violations of court orders. R7-293.

Despite the repeated warnings and sanctions, the Petitioners persisted in their misconduct. As the Trial Court found, "the court's entreaties, as well as the court's orders, were ignored by Plaintiffs' [Petitioners'] counsel." Pet. App. at 85; R10-376-41.

3. The decision below is consistent with those of this Court in *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991), *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), and *Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982).

Petitioners argue that the decision of the Court of Appeals below is inconsistent with that in *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991). However, this

argument is based on Petitioners' assertion that the Court in *Chambers* "found that outright dismissal of [the] lawsuit [wa]s too severe [a] sanction," despite evidence of false statements to the court. Petition at 42. But, the *Chambers* Court made no such finding: The sanction at issue in *Chambers* was not a dismissal, but an award of attorney's fees pursuant to the trial court's inherent power. The Court affirmed, reasoning that, because "outright dismissal of a lawsuit . . . is within the court's discretion[,] . . . the 'less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." *Id.* at 2133.

Petitioners also contend that the Eleventh Circuit's decision is inconsistent with this Court's decision in *Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982), wherein the Court recognized that a sanction imposed pursuant to Rule 37(b)(2) must be "just." Petitioners' extensive history of egregious misconduct, coupled with the prior warnings given Petitioners, clearly belies any claimed conflict between what is "just" and the decision of the Court of Appeals in this case.

Finally, Petitioners assert that the Court of Appeals' decision in this case is inconsistent with the Court's decision in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990). Yet, the decision in *Lytle* did not involve imposition of a sanction. Respondents can

identify nothing in *Lytle* that significantly relates to the issues Petitioners raise here.[6]

4. The decision below does not conflict with that of the Court of Appeals for the Seventh Circuit in *United States v. Reddick*, 620 F.2d 606 (7th Cir. 1980).

Taking a procedural tack, the Petitioners next assert that the decision below conflicts with that of the Court of Appeals for the Seventh Circuit in *United States v. Reddick*, 620 F.2d 606 (7th Cir. 1980). Petitioners apparently misapprehend the holding in *Reddick*, however, inasmuch as that decision seemingly has no application whatsoever to the procedural claim raised by Petitioners. Regardless, there is certainly no conflict between *Reddick* and the decision below.

Nevertheless, citing *Reddick*, Petitioners argue that District Judge Stafford lacked jurisdiction to review the Magistrate's Report and Recommendation of Dismissal, because Petitioners had requested that the Magistrate first reconsider his recommendation. The District Court, before undertaking its review, had entered an order explaining that Petitioners' unauthorized motion for reconsideration would be treated as Petitioners' objections to the Magistrate's Report. The Order also gave Petitioners additional time to file any additional objections. R10-389.

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[6] *Lytle* involved the collateral-estoppel effect of a district court's determination of issues common to equitable and legal claims; where the court resolved the equitable claims first, solely because it erroneously dismissed the legal claims. 494 U.S. at 547.

Petitioners assert that the *Reddick* Court held that "a motion [requesting a magistrate] to reconsider a proceeding [sic] which reaches the merits of the litigation is a Rule 59(e) motion to amend which tolls the appeals process [from the magistrate] to the district judge." Petition at 61. The *Reddick* Court held no such thing: In *Reddick*, a criminal defendant attempted to appeal directly to the court of appeals, from a magistrate's refusal to authorize payment for an investigator. The court of appeals thereupon observed that, because the Federal Magistrates Act, 28 USC § 636(b)(1)(A), expressly provides that a district court judge may reconsider a magistrate's ruling on a non-dispositive, pretrial matter, a party may not take a *direct* appeal, to a circuit court, from such an order. Thus, the *Reddick* court held that the appellant *waived* the right to appeal to the court of appeals, by not seeking intermediate review by the district court judge. Neither this holding, nor the *Reddick* Court's reasoning, conflicts with the decision of the Court of Appeals below.

Moreover, and wholly apart from any claimed "conflict" among the circuits, Petitioners' procedural argument is frivolous. As this Court recognized in *United States v. Raddatz*, 447 U.S. 667 (1980), "the magistrate acts subsidiary to and only in aid of the district court," with "the entire process tak[ing] place under the district court's *total control and jurisdiction*." 447 U.S. at 681 (emphasis added). *See also*, *Thomas v. Arn*, 474 U.S. 140, 154 (1985) ("[t]he district judge has jurisdiction over the case at all times.").

5. The issues Petitioners wish to litigate in this Court are meritless.

Petitioners claim that dismissal of this action violated Petitioners' fifth amendment right to due process of law. This claim is, as the Court of Appeals found, "meritless." Petitioners had multiple and ample warnings of the possibility of severe sanctions. Petitioners were given ample notice and opportunity to be heard at an evidentiary hearing on the motions for sanctions. Petitioners were represented by counsel--Petitioner Connie Reshard--at the hearing. The Magistrate's findings and conclusions have been reviewed twice--once on a *de novo* basis by the District Judge (who adopted the findings), and again by the Court of Appeals. The Record amply supports the Trial Court's findings of a long pattern of egregious misconduct by Petitioners (including deliberate misrepresentations to the Court and willful violation and obstruction of court orders), all of which was designed to, and did, greatly prejudice the Respondents.[7]

Petitioners claim that "restriction of material evidence which would contradict certain factual findings and conclusions of law with respect to discovery abuses is inconsistent with due process of law." Petition at 37-38. Petitioners thus seem to contend that the Trial Court refused to receive and consider evidence that Petitioners suggest they attempted to introduce at the

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[7] The Magistrate explicitly considered the extent to which Petitioners' misconduct prejudiced the Respondents, and found that prejudice to be "great." App. 113-114; R10-376-57.

hearing on the motions for sanctions. Petition at 56-57. As another "due-process" claim, Petitioners also suggest that the Trial Court somehow failed to address Petitioners' allegations of destruction and concealment of evidence, and of discovery abuses, by the Respondents. Petition at 54-56.

These contentions and suggestions are entirely without support in the Record. Petitioners did repeatedly make unsupported allegations of misconduct on the part of Respondents, but those allegations frequently were rooted in an apparent misunderstanding of civil procedures,[8] were based entirely on a record that revealed the allegations to be specious,[9] or were simply

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[8] For example, in August 1986, Petitioners accused counsel for one Respondent with noticing the depositions of Petitioners' witnesses in "bad faith," merely because deposition subpoenas were not served on the witness prior to the filing of the Notice. R2-107.

[9] *See, e.g.*, Pet. App. at 28, where the Trial Court found that Petitioners' Counsel had "falsely" and "maliciously" accused Counsel for Respondent of deliberately misleading the Trial Court in a document filed with the Court. The Court found that the accusation was "contrary to the written record in this court," where the allegedly misleading claim was said to have been made: "Counsel for [Respondent] TCH clearly made no such claim" as was alleged by Petitioners. As the Trial Court stated, regarding a related matter,

> Like other matters asserted in this case, Plaintiffs [Petitioners'] allegations as to what the court "found" in doc. 220, are false. And like all that has been set forth above, after running the rabbit trail through the documents, the falsity of the assertion is eventually discovered.

Pet. App. at 34.

never placed in issue.[10] In nearly every instance where such allegations *were* placed in issue, the Petitioners simply failed to present competent evidence to support a finding in their favor, with respect to these allegations. Pet. App. at 19-36 (Order ruling on Petitioners' "Motion to Vacate Findings of Fact").[11] *See also, id.* at 93-94; 95 ("Plaintiffs' [Petitioners'] charge is accompanied by no supporting evidence"). In other instances (also not material herein), the Trial Court did hold hearings and determine facts.[12]

At the hearing on the motions for sanctions held on December 6, 1990, Petitioners sought to introduce only one item, a letter from a purported expert witness. That item was received and made a part of the Record, in connection with the motions, R18-90, and no other documents were offered or proffered by Petitioners, *in*

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[10] For example, the Petitioners *never* sought production, from any Respondent, of their decedent's heart; let alone did they ever move to compel its production.

[11] In that Motion, Petitioners contended that the Magistrate had made binding findings of fact with respect to these matters, and requested the Magistrate to vacate its prior findings of fact. R9-344. Paradoxically, Petitioners now contend that the same allegations were never addressed.

[12] For example, the Trial Court held an evidentiary hearing on Petitioners' Motion to Disqualify Defense Counsel and for Default Judgment, made detailed findings of fact, and denied said motion. R4-186; R7-287.

camera or otherwise.[13] Petitioners' contention that evidence, allegedly in Petitioners' favor, was arbitrarily refused, depriving them of property without due process of law, is directly contradicted by the Record.

The Petition herein, including the Appendix, reveals barely "the tip of the iceberg" of this most unfortunate case. Underneath, there lies a massive, morassy Record reflecting litigious viciousness and misconduct of the rankest order, perpetrated in and upon the courts below for years, by the Petitioners. However, after much patient cajoling, and after clear and stern warning, the Trial Court saw fit to terminate this unseemly process, only after the Petitioners engaged in clearly contemptuous behavior.

The Trial Court reached this determination lawfully, carefully, and after affording due process; and the appellate court found the ensuing appeal to be meritless. Respondents respectfully request that this Court spare the parties, the courts below, and--indeed--the judicial process, continued abuse at the hands of these Petitioners. This case is not worthy of discretionary review; it is worthy of dismissal, as was properly determined and affirmed below.

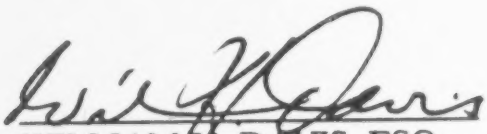
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[13] Indeed, counsel for Respondent Dr. Britt specifically requested that certain enclosures, that allegedly accompanied the letter, also be introduced. R18-92. However, Petitioners objected; and the Magistrate received the letter without the enclosures, pursuant to Petitioners' request. In any event, the subject letter relates indirectly to only one of many findings upon which the sanction order was based.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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